IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01/07/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1453 of 1991

1.Govindammal
2.Poongavanammal
3.Bhoopal. .. Appellants

-Vs-

1.Thulasi Pillai
2.Manimaran .. Respondents

The above Second Appeal is directed U/s 100 of C.P.C. as stated therein.

For Appellants : Mr.R.Subbiah
for Mr.T.Murugamanickam.

For Respondents :Mr.N.Damodaran.

:JUDGMENT

This Second Appeal is directed against the judgment and decree dated 19.4.1989 rendered in A.S.No.89 of 1987 by the Court of Subordinate Judge, Tindivanami, thereby confirming the judgment and decree dated 30.9.1987 rendered in O.S.No.405 of 1983 by the Court of District Munsif, Chengee.

2. Tracing the history of the above second appeal coming to be preferred, what comes to be known is that the appellants herein have filed the suit for declaration that the suit properties belong to the plaintiffs and for permanent injunction restraining the defendants from in any manner interfering with the plaintiffs' peaceful possession and enjoyment of the suit properties on averments such as that the suit properties and the other properties originally belonged to one Kathavarayapillai which he got in the oral partition held among himself and his brother Thandavarayapilloai whose son is the first defendant; that Kathavaraya Pillai was in enjoyment of the same;that Kathavarayapillai had sold the house which was allotted to him to the defendants' family and that Kathavarayapillai was in possession and enjoyment of the suit properties till his death open to the knowledge of the defendants and he was paying kist in respect of the suit properties; that Kathavarayapillai executed a registered Will on 2.10.1954 bequeathing his properties including the suit properties in favour of the plaintiffs 1 and 2 who are respectively his wife and daughter; that the 3 rd plaintiff was born after the death of Kathavarayapillai; that the Will was attested by

Thandavarayapillai, father of the first defendant; that the scribe of the Will is Village Karnam; that the plaintiffs are jointly in possession and enjoyment of the suit properties; that since the joint patta was granted in favour of the 3rd plaintiff who is the male member of the family, he has been impleaded as a party to the suit; that after the death of her husband, the first plaintiff was paying kist in respect of the suit properties; that on 2.10.19 54 the father of the first defendant due to love and affection executed a settlement deed in respect of some of the items of properties in favour of the 3rd plaintiff and he is in possession and enjoyment of the same; that the defendants insisted the 3rd plaintiff to hand over the properties settled in his favour and since the plaintiffs refused to do so, the defendants are trying to interfere with the peaceful possession and enjoyment of the suit properties saying that they are entitled to a share in the suit properties and hence the plaintiffs have come forward to file the above suit praying for the reliefs extracted supra.

3. In the written statement filed by the first defendant, which was adopted by the 2nd defendant, the defendants, besides generally denying the allegations contained in the plaint, would submit that the suit filed by the plaintiffs is not maintainable; that the alleged Will is not true and valid; that even though Thandavarayapillai had attested the Will the plaintiffs are not entitled to the suit properties; that the defendants are not asked to return the properties as alleged in para 4 of the plaint; that no settlement deed was executed on 2.10.1954; that in the year 1962, there was an oral arrangement in between Kathavarayapillai and Thandavarayapillai in respect of the properties and as such items 1 and 2 of the suit properties were given to Thandavarayapillai by exchanging some of the properties belonging to him; that ever since he is in possession and enjoyment of the suit properties and is paying kist to the suit properties; that since the plaintiffs are in possession and enjoyment of the properties which were given through oral arrangement and having benefited through the properties, they are not entitled to claim items 1 and 2 of the suit properties. On such grounds the defendants would ultimately pray to dismiss the suit with costs.

4. The trial Court, based on these pleadings, would frame 6 issues for determination of all the questions which are involved in the whole of the suit and would allow the parties to record their evidence both oral and documentary as a result of which on the part of the plaintiffs they would not only examine the first plaintiff as P.W.1, but also would examine yet another witness viz., Ponnusamy as P.W.2 on their side for oral evidence, besides marking 16 documents as Exs. A1 to A16 for documentary evidence, Ex.A1 dated 2.10.1954 being the registered Will executed by Kathavarayapillai in favour of the plaintiffs 1 and 2, Ex.A2 being the joint patta in favour of 3rd plaintiff, 1st defendant and 7 others, Ex.A3 to A11 being the kist receipts for the faslies 1385,1386,1387,1383,1385,1387, 1391, 1393, Ex.A12 dated 20.3 .1983 being the notice issued by the Inspector, Land Survey and Development Department, Chenji, Ex.A13 dated 23.6.1983 being joint patta granted by the Special Tahsildar, Land Survey in favour of 3rd plaintiff and 3 others, Ex.A14 being the invitation card for 16th day ceremony, Ex.A15 dated 24.9.1983 being the copy of lawyer's notice issued by 1st plaintiff to the 1st defendant, Ex.A16 dated 29.9.1983 being the postal acknowledgment card.

5. Likewise, on the part of the defendants, they would not only examine the first defendant as D.W.1, but also would examine 4 more witnesses as D.Ws. 2 to 5 on their side for oral evidence and they would also mark 4 documents for documentary evidence as Exs.B1 to B4, Ex.B1 dated 15.5.1969 being the xerox copy of settlement deed executed by Thandavarayapillai in favour of 1st and 3rd plaintiffs, Ex.B2, dated 15.5.1969 Ex.B3 dated 2.2.1971 being the kist receipts in favour of Thandavarayapillai for the faslis 1379, and 1380, Ex.B4 dated 12.1 2.1983 being the adangal in favour of Thandavarayapillai for the faslis from 1378 to 1392.

6. Besides, the trial Court would mark 3 Court documents as Exs.C1 to C3, Ex.C1 dated 24.3.1967 being the report of the Advocate Commissioner, Exs.C2 and C3 being the sketches.

7. The Trial Court, having traced the facts and circumstances of the case in the manner required by law and appreciating the above evidence would ultimately dismiss the suit in respect of items 1 and 2 of the suit properties and decree the suit in respect of item 3 of the suit property further directing the plaintiffs to pay costs of Rs.157.50 to the defendants. Aggrieved, the plaintiffs have preferred an appeal in A.S.No. 89 of 1987 on the file of the Court of Subordinate Judge, Tindivanam and the said Court also having framed its own points for consideration and having its own discussions has ultimately dismissed the appeal thereby confirming the judgment and decree passed by the trial Court and it is only aggrieved against this judgment and decree of the first appellate court dated 19.4.1989 the plaintiffs have come forward to prefer the above second appeal on certain grounds as brought-forth in the grounds of second appeal and at the time of admission this Court has admitted the above second appeal for determination of the following substantial questions of law:

i. Whether the judgment of the courts below are vitiated in placing reliance on Ex.B.1 which is a xerox copy of unregistered alleged settlement deed?

ii. whether the judgments of the courts below are vitiated in that they have found there was a family arrangement in the absence of pleading to that effect?
iii. Whether the judgments of the courts below are vitiated in that they have thrown the burden on the plaintiffs to prove that the defendants have not perfected their title by adverse possession?
iv. Whether the judgments of the courts below are vitiated in that they have misunderstood the commissioner's report and have placed reliance on the same to decide as to who is in possession of the suit properties?
v. Whether the judgments of the courts below are vitiated in that they have failed to consider the evidence of P.W.2?

7. During arguments, the learned counsel appearing on behalf of the appellant would submit that the appellants filed the suit praying for declaration and permanent injunction wherein the suit properties are in three items, the first one falling under S.No.38/1 with an extent of 0.34 acres, the second one falling under S.No.38/1 with an extent of 0.16 acres and the third one falling under S.No.38/1 with an extent of 0.32 acres in this quarter

share; that the suit property originally belonged to Kathavaraya Pillai, the husband of the first plaintiff and the father of the second and third plaintiffs; that he got it by oral partition held in between himself and his brother Thandavaraya Pillai; that the defendants are the sons and grand sons of Thandavaraya Pillai; that Kathavaraya Pillai executed a Will dated 2.10.1954 in favour of the first and second appellants and the third appellant was born only subsequently; that the Will came into force on the death of Kathavaraya Pillai in the year 1966; that the plaintiffs are in possession of the property and that in the year 1983, the defendants attempted to enter into the suit properties and hence the suit.

8. Continuing to argue, the learned counsel would point out that the defendants admit the execution of the Will but would allege that the same was not acted upon; that the defendants would further allege that in the year 1962, there was an oral exchange of lands between Kathavaraya Pillai and Thandavaraya Pillai which is not valid in law; that the property mentioned in the schedule was allotted in favour of Thandavaraya Pillai; that the other property measuring 0.48 acres was handed over to Kathavaraya Pillai; that the case of the defendants is that after exchange, they are in possession, but, according to the appelants, no oral exchange of property is admissible in law; that to prove oral exchange, the defendants brought Ex.B.1 which is only a xerox copy and nowhere it is mentioned `pursuant to oral exchange'; that being a xerox copy, Ex.B.1 cannot be admitted. On such arguments, the learned counsel would pray to allow the appeal setting aside the judgments and decrees of both the Courts below.

9. In reply, the learned counsel appearing on behalf of the respondents would submit that the whole case can be divided into three parts, the first one pertaining to the Will by Kathavaraya Pillai dated 2.1 0.1954 whereby the first and second plaintiffs' have been bequeathed with the suit properties; that secondly, the oral exchange of the properties and thirdly the settlement of the year 1969 and the point that is to be decided is `whether the suit properties and the exchanged properties are in possession and enjoyment of the plaintiffs or the defendants'. The learned counsel would cite Para No.9 of the trial Court's judgment wherein, while discussing the oral and documentary evidence, the trial Court has discredited not only the oral evidence adduced on the part of the plaintiffs but also Ex.A.1 Registered Will dated 2.10.1954 executed by Kathavaraya Pillai in favour of the plaintiffs 1 and 2 but has given credence to Ex.B.1 gift settlement deed dated 15.5.1969 executed by Thandavaraya Pillai in favour of the first and third plaintiffs. The trial Court would arrive at the conclusion that Ex.A.1 Will was not acted upon whereas only Ex.B.1 settlement deed was acted upon thus giving credence to exchange of lands alleged to have taken place in the year 1962 whereby Kathavaraya Pillai having entrusted Items 1 and 2 of the suit properties with Thandvaraya Pillai had obtained in turn the 48 cents of land adjacent to Ahmed Sahab's land. Also citing from the other parts of the trial Court and the first appellate Courts judgments, the learned counsel would ultimately pray to dismiss the appeal confirming the judgments and decrees passed by both the Courts below. But, for this, on the part of the defendants, no law or legal propositions would be argued.

10. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that it is a straight forward suit filed on the part of the plaintiffs seeking declaration and permanent injunction. The claim of the plaintiffs is mainly based on Ex.A.1 Will dated 2.10.1954 and the case of the defendants is based on Ex.B.1 gift settlement deed dated 15.5.1969. In support of the case of the plaintiffs, they would also put forth Ex.A.2 joint patta standing in the name of the third plaintiff and the first defendant and seven others and the other documents Exs.A.4 to A.11 being the kist receipts ranging from the year 1974 to 1985 and the other documents of the `A' series from Exs.A.12 to A.16 are respectively the notices issued by the Revenue Inspector, the patta issued by the Tahsildar, the death intimation card of Kathavaraya Pillai, the legal notice issued by the first plaintiff to the first defendant and the acknowledgment for receipt of the same.

11. On the contrary, on the part of the defendants, besides Ex.B.1 gift settlement deed dated 15.5.1969, two kist receipts in the name of Thandavaraya Pillai as Exs.B.2 and B.3 and the cultivation adangal as Ex.B.4 would only be placed on record. Besides these documents, three documents would also be marked as Court documents viz. the Commissioner's report and two sketches for oral evidence. Besides the first plaintiff, three other witnesses and the Advocate Commissioner would be examined for oral evidence. In appreciation of all these evidence, the trial Court and the first appellate Court would arrive at the concurrent findings to hold that the plaintiff is not entitled to the reliefs sought for and would dismiss the suit and appeal of the appellants/plaintiffs.

12. The focal point on the substantial question of law framed at the time of admission of the above second appeal which are to be answered for determination of the second appeal, no doubt the first substantial question of law is pertaining to Ex.B.1 settlement deed and in fact this settlement deed is produced against Ex.A.1 Will. At the outset it is relevant to consider the character and the reliability of these documents in evidence. A cursory glance had into these documents would show that Ex.A.1 is a registered Will executed by Kathavaraya Pillai in favour of the first and second plaintiffs which has been produced in original. But, on the contrary, Ex.B.1 is nothing but a xerox copy of the settlement deed executed by Thandavaraya Pillai in favour of the first and third plaintiffs which is inadmissible in evidence, but the same has been allowed to be marked by the trial Court. Even though no relevance could be placed on this document, being a xerox copy, both the Courts below have totally relied upon this document and the oral evidence adduced on the part of the defence witnesses.

13. It is not only that Ex.A.1 registered Will is a highly reliable one, the contents of which are very simple and lucid but also as the supporting evidence, the plaintiffs have put forth Ex.A.2 joint patta passbook in confirmation of their case. The kist receipts paid for the suit properties in Exs.A.3 to A.11 would only go to prove that the plaintiffs have been in possession and enjoyment of the suit properties so as to pay the kist to the Government periodically. The other documents would also render supporting evidence in confirmation of the case of the plaintiffs.

14. Neither Ex.B.1 could be admitted nor the contents of the said document appreciated in evidence and therefore no doubt, the judgments of the Courts below have been vitiated in placing reliance on Ex.B.1 alleged settlement deed and therefore this substantial question of law has to be decided against the defendants and in favour of the plaintiffs.

15. So far as the second substantial question of law is concerned, it is regarding the family arrangement said to have been made in the year 1962 wherein there had been an exchange of land according to which the case of the defendants is that Items No.1 and 2 of the suit properties have been exchanged by Kathavaraya Pillai with Thandavaraya Pillai for 48 cents of land. Both the Courts below merely relying on the oral evidence and the unreliable Ex.B.1 xerox copy, would arrive at the conclusion that it is the defendants who have been in continuous possession and enjoyment of the suit properties particularly Items no.1 and 2 and not the plaintiffs.

16. The further reliance placed in favour of this argument by the Courts below is Ex.B.4, Adangal extract for faslis 1378 to 1392 wherein only the name of Thandavaraya Pillai is found as the owner and person in occupation which could be attributed to the mechanical entry effected therein in the name of the eldest member of the family and nothing else nor could it be said that from the year 1968 to the year 198 3, it is only Thandavaraya Pillai who was in possession and enjoyment of the property in ejection of the plaintiffs, which is a false conclusion that could be arrived at in the context of `A' series documents submitted on the part of the plaintiffs and the natural oral evidence adduced on the part of P.Ws.1 and 2 and therefore only based on Ex.B.4, no definite conclusion could be arrived at particularly regarding the possession of the suit properties so as to either decide the question of the theory of exchange or the perfection of title by the defendants by adverse possession and therefore the lower Courts have bluntly arrived at the conclusion that there had been a family arrangement and exchange of lands and that only the defendants are in continuous possession of the suit properties and all these conclusions are only products of assumptions and presumptions of the Courts below and not based on any legal evidence and for arriving at such vague and indefinite conclusions, the judgments of the Courts below would only become vitiated thus deciding the second substantial question of law also against the respondents/defendants.

17. The third substantial question of law pertains to the perfection of title by adverse possession by the defendants, which is not a question that could be so easily decided. First of all, title by means of adverse possession could be established only by a person who is not the owner of the property and against the admitted true owner, which is not the case of the defendants since their strong plea is that by the exchange of the lands, they have become not only the owners but also in possession and enjoyment of the suit properties and therefore the parties claiming ownership also cannot claim to have perfected their title by adverse possession. It must be mentioned that the defendants have not at all established any other features that are necessary to conclude title by means of adverse possession which should be

open to the knowledge of the person who is the title owner and therefore the question of perfection of title by means of adverse possession by the defendants cannot at all be concluded to have been established wherein for such conclusions to be arrived at based on adverse possession, very strong documentary evidences are required since it is not a subject that could be concluded based on simple oral evidence. Therefore, the third substantial question of law could also be decided only as against the defendants and the same is decided accordingly.

18. The fourth and fifth substantial questions of law are pertaining to the Commissioner's report and the evidence of P.W.2. So far as the evidence of P.W.2 is concerned, it is unblemished, independent and to the point thereby establishing the case of the plaintiffs regarding their claim to the suit property. The Commissioner's report could only speak to the physical features and location and existence of the suit properties and cannot either establish the possession or enjoyment and therefore based on the report of the Commissioner, no conclusion could be arrived at regarding possession and enjoyment of the properties by either of the parties and therefore easy conclusions could be arrived at, that the Courts below have misunderstood the Commissioner's report and placing reliance on the same to decide the possession of the properties and therefore these substantial questions of law also are answered in the negative to the defendants and in favour of the plaintiffs.

19. The next vital aspect of the case regarding which the trial Court has erred is simply accepting the arguments of the defendants in citing Section 59 of the Evidence Act and taking it for granted that the Court could appreciate the oral evidence forgetting the fact that only in the absence of any documentary evidence, such course is possible. On the other hand, the relevant Section for consideration, in the context of the facts of the case, is Section 92 of the Evidence Act wherein it is clearly founded that no oral evidence could be put forth as against the documentary evidence, which is available. So far as the lower Courts appreciating the oral evidence adduced on the part of the defendants, as against Ex.`A' series documents particularly Ex.A.1, from the manner in which the Courts below have appreciated the evidence, the only conclusion that could be arrived at is that the appreciation of evidence by both the Courts below is perverse.

20. For these and on a overall consideration of the facts and circumstances of the case, this Court is only able to see that serious errors of law and facts have been committed by both the Courts below in the manner of dealing with the facts and circumstances of the case and the law encircling the same resulting in both the judgments of the Courts below becoming vitiated in law. The judgments of the courts below would only depict patent errors of law and perversity in approach having crept into and hence they are unacceptable by any means and only become liable to be set aside.

21. The plaintiffs' case is a plain and straight forward one without any ambiguity or complication and the evidence placed on record on their part is also to the fact which have sprung up in the natural course of time and therefore there is no difficulty in arriving at the conclusion to answer the

questions which arose in the suit in favour of the plaintiffs and as pleaded and established in evidence, the plaintiffs are definitely entitled to the reliefs sought for in the suit and hence the following judgment:
In result,
(i)the above Second Appeal succeeds and the same is allowed;

(ii)the judgment and decree dated 19.4.1989 rendered in A.S.No.89 of 1987 by the Court of Subordinate Judge, Tindivanam and the judgment and decree dated 30.9.1987 rendered in O.S.No.405 of 1983 by the Court of District Munsif, Chengee are set aside.
(iii)The suit in O.S.No.405 of 1983 on the file of the Court of District Munsif, Chengee is decreed thereby declaring the title of the plaintiffs to the suit properties and restraining the defendants and their men by way of permanent injunction from in any manner interfering with the plaintiffs' peaceful possession and enjoyment of the suit properties.
However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes

Internet: Yes

gr/Rao

To
1.The Subordinate Judge,
Tindivanam.

2.The District Munsif,
Chengee.